JD-35-06
Bedford, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL ASSOCIATION OF
HEAT AND FROST INSULATORS AND
ASBESTOS WORKERS, LOCAL NO. 84

and Case 8-CB-10424

DST INSULATION, INC.

Iva Y. Choe, Esq.,
for the General Counsel.
William D. Brady, Esq. and
Joseph Allotta, Esq.,
(Allotta, Farley & Widman Co., LPA),
of Toledo, Ohio,
for the Respondent.

DECISION

Statement of the Case

Karl H. Buschmann, Administrative Law Judge. This case was tried in Cleveland, Ohio, on February 14, 2006. The charge was filed by DST Insulation, Inc., on September 1, 2005[1] and the complaint was issued November 30, 2005, alleging that the Union violated Section 8(b)(3) of the National Labor Relations Act (the Act), by failing and refusing to bargain collectively and in good faith with the Employer, DST Insulation, Inc. (DST or the Company).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

DST Insulation, Inc., a corporation, engaged in the business of insulation contracting services at its facility in Bedford, Ohio, where it annually provides services valued in excess of $50,000 to other enterprises located in Ohio which are engaged in interstate commerce. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent, International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 84, Akron/Youngstown, (the Union or Local 84) is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2004 unless otherwise indicated.

II. Alleged Unfair Labor Practices

The Union and DST International, Inc. (DST) have had a bargaining relationship pursuant to Section 8(f) of the Act since January 23, 2002, when DST executed an agreement accepting the terms and conditions of the collective bargaining agreement, effective July 1, 2001 to June 30, 2004, between Master Insulators' Association of Akron, Ohio, and Builders Association, as well as Local Union No. 84 (Jt. Exhs. 1, 2). When the 2001 agreement expired, a new agreement became effective from July 7, 2004 to June 30, 2008, between Master Insulators' Association, the Builders Association and Local 84 (Jt. Exh. 3). The parties disagree as to whether DST became a party to the new "2004 agreement."

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The Company maintains that on March 19, 2004, it notified the Union by fax and by letter, of its intention not be bound by a new agreement. Skip Karl, president of DST, testified that he faxed and mailed a letter, dated March 19, 2004 to Mike Mollohan, business agent for the Respondent. The handwritten letter, addressed to Mike, states (GC Exh. 3):

> Due to lack of support from Union people and the other Contractors following there (sic) own rules I will not be signing any new Contracts on or some time before July 1st, 2004, I will be mailing this to you through regular mail.

Karl's testimony was supported by a Certificate of Mailing showing that DST had proof of a mailing to Local 84 (GC Exhs. 4, 5). The Union denies ever receiving any communication to that effect from the Company, Rollin Reth, business manager for Local 84, testified that the Union did not have such a letter in its files and that he personally was unaware of such a communication from DST until the current controversy. In any case, DST did not sign a new agreement, it did not participate in the negotiations leading up to the 2004 agreement, but it complied with all the substantive terms of the new agreement.

By letter of November 11, 2004, the Union demanded that DST recognize Local 84 as the exclusive bargaining representative of its employees (Jt. Exh. 4). After DST failed to respond to the Union's request, it filed a representation petition (Case No. 8-RC-16691) on January 31, 2005 (Jt. Exh. 5). Following an election on March 25, 2005, where the Union won, it was certified on April 4, 2005 (Jt. Exhs. 6, 7). The Unit is defined as:

> All full-time and part-time insulation installers and fabricators, including journeymen, apprentice and improvers employed by the Employer from its residential office at 56 Gould Avenue, Bedford, Ohio 44146 but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

DST's president Karl testified that he had left several messages with Local 84 requesting that the parties negotiate a contract.

The General Counsel argues that DST effectively terminated the July 1, 2001 to June 30, 2004 contract by letter of March 19, 2004, that DST did not become a party to the new contract, effective July 7, 2004 until June 30, 2008, and that the Union refused to bargain in good faith with DST. The Respondent argues that DST never properly terminated the collective bargaining agreement which expired on June 30, 2004, and was still bound by it, that it failed to show unconditional and unequivocal intent to withdraw from the multi-employer bargaining unit and by its conduct in conformity with the current bargaining agreement is bound by it, and that the conversion from a Section 8(f) relationship to a Section 9(A) relationship had no effect on the agreements.

Analysis

Initially I find Karl's testimony, supported by other evidence, credible that DST had sent the letter, dated March 19, 2004 to the Respondent. The letter informed the Union that for certain reasons Karl "would not be signing any new contracts on or sometime before July 1, 2004." That notification, according to the General Counsel, constituted an effective termination by DST of any further contractual obligations of the multi-employer unit. Generally, a withdrawal from a multi-employer bargaining unit requires that written notice of withdrawal be given which is both timely and unequivocal. *Retail Associates,* 120 NLRB 388 (1958). As observed by the General Counsel, that standard is not applicable to Section 8(f) relationships dealing with employers engaged primarily in the building and construction industries. At the point in time when DST wrote the letter, it had a Section 8(f) agreement with the Union. The Board has held that the standard applies to a Section 9 relationship but not to one arising under Section 8(f) of the Act. *James Luterbach Construction Co.*, 315 NLRB 976 (1994). According to that decision the employer is bound by a multi-employer unit only if it was part of that unit prior to the controversy and if it acted to recommit itself to be bound by the new negotiations. The record here does not show that DST had been a member of the multi-employer unit prior to its signing the 2001 to 2004 agreement.

However, the Company's message of March 19, 2004 was not a clear or unequivocal repudiation of the existing bargaining agreement, nor did it in clear and unmistakenable language inform the Union that the Company no longer recognized the Union as the employees' bargaining representative, it merely stated that the Employer did not intend to sign a new agreement. Arguably, DST remained obligated to abide by the terms and conditions of the expired contract.

In the meantime, the Respondent adhered to the terms of the new collective bargaining agreement, even though DST did not participate in the negotiations for a successor agreement. According to the Respondent, Karl also had not formally resigned from the multi-employer unit but displayed a continued involvement with it. For example, the Union sent letters to the Master Insulators Association of Ohio with copies to DST, as a member, about the ongoing negotiations for a new contract (R. Exhs. 2A, 3). Yet DST did not disavow the attempt by the Union to remain connected with it. From 2002 to 2005, the Respondent made contributions the Asbestos Workers Local 84 benefits funds (Jt. Exh. 3). Among the deductions from the employees' pay were contributions to the Contractors Administrative Fund, as well as deductions for Health and Welfare, Pension, Union fees and Apprenticeship funds. DST paid the union dues and fringe benefits on the Kent State job, which Karl characterized as public where contractors are required to pay prevailing wages, even though union membership is not required (R. Exh. 9). The Company also accepted referrals through the Union Hall (R. Exh. 10). Indeed, the Company maintained a correspondence with the Union as if it were a union contractor. For example, as required by the new 2004 agreement, DST informed the Respondent by letter of

October 14, 2004 that there will be layoffs (R. Exh. 11). The Company communicated on several occasions with the Union on mutual concerns relating to its employees.

I agree with the Respondent that the overwhelming evidence shows that DST has complied with all aspects of the 2004 agreement. In accordance with the new agreement, DST: (1) in December 2004, paid all relevant fringe benefits as outlined in the Union's letter of August 19, 2004, (2) withheld the 7.5% union dues, an increase from the 5% in the expired contract, (3) used the exclusive referral procedures, including the Union's out of work list, (4) informed the Union of impending layoffs and disclosed to the Union its bids on nonunion construction jobs. In addition, the Company's president attended the Union's Labor Management Committee Meeting open only to contractually bound employers. Finally, in a dispute about fringe benefits, DST and the Respondent executed a Stipulated Judgment Entry on July 19, 2005 (R. Exh. 14) and by letter of August 8, 2005, DST referred to its compliance with the 2004 contract (R. Exh. 6).

The General Counsel has not disputed any of these contentions, stating that DST was privileged to make unilateral changes following the expiration of the 2001 agreement nut chose to follow the wage and fringe benefit increases detailed in the 2004 agreement. The General Counsel referred to Karl's testimony that his reason for complying with the 2004 agreement "was trying to keep up some sort of working communication with the Local to see if we could work this out before it got this far" (Tr. 115). Relying on the Board's decision in *Plasterers Local 337 (Marina Concrete),* 312 NLRB 1103 (1993), the General Counsel argues that DST which lawfully terminated its bargaining obligation to the Union, had the right to comply with the terms of the contract without incurring any contractual obligations and without any inference of an adoption-by-conduct. The employer in that case, however, had informed the Union and the multi-employer unit in timely written and unequivocal notices that it would not be found I any shape or form by any agreements negotiated between the union and the multi-employer unit. The employer's message was a clear and unequivocal repudiation of its bargaining relationships with the union. According to the Board, the employer manifested every intention not to be bound by either the old or the new agreement.

Here, the Company's President merely informed the Union that it would not sign any new contracts, but left open the questions whether he would continue to abide by the terms of the expired contract, whether he considered himself to be a member of the Masters Insulator's Association and whether the relationship with the Union was terminated. I agree with the Respondent that DST voluntarily adopted the 2004 successor contract by manifesting its intentions to abide by its terms. *E.S.P. Concrete Pumping,* 327 NLRB 711 (1999). There, the Board held that an employer and a union may enter into a collective-bargaining agreement without having reduced to writing their intent to be bound; instead the formation of the contract is established by conduct demonstrating intent to be bound by the terms of the agreement. The Board held that the adoption by conduct principles are equally applicable to 8(f) and 9(a) agreements.

Under these circumstances, I find that DST is bound by the 2004 agreement, and that Karl's repeated requests to bargain with the Union following its certification on April 4, 2005 were properly rejected. In sum, even though the Union's certification resulted in a 9(a) relationship, the Company remained bound by the 2004 contract by virtue of its adoption by conduct. Accordingly, I dismiss the allegations in the complaint.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., May 24, 2006.

Karl H. Buschmann
Administrative Law Judge

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.